

**SC94441**

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**IN THE SUPREME COURT OF MISSOURI**

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**VISIONSTREAM, INC.,**

**Appellant,**

**vs.**

**DIRECTOR OF REVENUE,**

**Respondent.**

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**On Appeal from the Administrative Hearing  
Commission, State of Missouri**

**Honorable Karen A. Winn, Commissioner  
Case No. 12-1289 RS**

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**BRIEF OF THE APPELLANT**

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### **Preliminary Statement**

Visionstream, Inc. (Visionstream) filed claims for refund with the Director of Revenue (Director) for sales tax paid between February 1, 2007 and January 31, 2010. The Director denied in major part the claims and Visionstream petitioned the Administrative Hearing Commission for review. The key issue at the hearing was whether title to exhibits created and sold by Visionstream passed in Missouri, making the sales taxable, or outside Missouri, making them nontaxable. The Commission relied on an unsigned Display Order (Pet. Ex. 10) containing the delivery term “F.O.B. manufacturer” to hold that title to all displays passed at Visionstream’s loading dock, making the sales taxable. (at 14) Visionstream submits that as a matter of law and fact, the Commissioner erred in its holding because the delivery term was never used in connection with the stated price and title passed outside the State of Missouri.

This Court should reverse the Commission’s decision.

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**Jurisdictional Statement**

This is an appeal from a decision of the Administrative Hearing Commission denying claims for refund of sales tax collected on remitted on sales of tangible personal property by Plaintiff Visionstream, Inc. This case falls within this Court's exclusive appellate jurisdiction under Mo. Const. art. V, § 3 and Section 621.189, RSMO. because resolution of these issues involves the construction of one or more revenue laws of this state.

### **Statement of Facts**

During the period at issue, February 1, 2007 through January 31, 2010, Plaintiff Visionstream, Inc. designed and constructed trade show displays for customers (L.F. 59). The displays had to be put together at the out of state shows and inspected by the clients before they were invoiced for them (Id., Tr. 20). The displays were shipped via common carrier and the clients paid for the shipping (L.F. 61). Visionstream collected and remitted sales tax on the sales of the displays but submits in its refund claims that the sales were tax-exempt as being out of state sales, pursuant to Section 144.040.1, RSMO. (L.F. 61-64) Visionstream invoiced the clients but there was no written contract specifying the passage of title or assignment of risk of the displays. (L.F. 68, Tr. 21, 78) There was an unsigned Display Order entered into evidence, containing the term “FOB manufacturer,” for the delivery term, but no evidence that it was part of the contract between Visionstream and its customers. (L.F. 68, Tr. 21)

**Point Relied On**

The Administrative Hearing Commission erred in holding that Visionstream, Inc. was not entitled to sales tax refunds *because* the sales of tangible personal property were exempt from tax as out of state sales, in that Section 144.030.1, RSMO. exempts transfers of title or ownership in commerce and title to the goods at issue passed out of state.

## **ARGUMENT**

The standard of review of the Administrative Hearing Commission's decision is set forth in *Fenix Construction Co. of St. Louis et al. v. Director of Revenue*, No. SC93915 (Mo. banc November 25, 2014): "The AHC's decision will be affirmed if (1) it is authorized by law; (2) it is supported by competent and substantial evidence based on the whole record; (3) mandatory procedural safeguards are not violated;; and (4) it is not clearly contrary to the reasonable expectations of the legislature. Section 621.193." [at 2-3] This Court reviews the AHC's interpretation of Section 144.030.1 de novo. The burden is on the taxpayer to show clearly and unequivocally that the exemption applies. Id.

The evidence in this case was clear that Visionstream shipped tangible personal property out of state (Ex. 11, 15) by common carrier (Tr. 19, 49, 77). Visionstream proved its entitlement to a sales tax exemption under the Director's regulation, 12 CSR 10-113.200(3)(B):

Unless otherwise agreed by the parties, when a Missouri seller delivers tangible personal property to a third-party common or contract carrier for delivery to an out-of-state location, title does not transfer in Missouri and the sale is not subject to Missouri sales tax. A buyer that carries its own goods is not acting as a common or contract carrier.

The Administrative Hearing Commission erred in characterizing the "Display Order" as a standard contract in this case, in an attempt to show the intent of the parties. The Commission acknowledged that the order was seldom executed with clients and the order



in evidence was not signed and there was no evidence that the parties followed: “The testimony and evidence from the hearing bear out its contention that the parties seldom executed the Display Agreement.” (at 11). Even if the delivery term “FOB manufacturer” applied here, title passed when the goods were delivered out of state, and thus there were no taxable sales.

Under Section 144.020.1, retail sales of tangible personal property in Missouri are subject to sales tax. Sales of products sent out of state would be exempt from sales tax under Section 144.030.1. Under the evidence presented, there was no contractual agreement that included the term “FOB manufacturer.” The term was in a blank, unsigned, and seldom used Display Order. No one had signed it—how could Visionstream have enforced its terms against a customer in court?

When there is no express delivery term in the contract, the Uniform Commercial Code, Section 400-2.509(1)(b) provides that “where the contract requires or authorizes the seller to ship the goods by carrier. ..(b) if it does require him to deliver them at a particular destination and the goods are there duly tendered while in the possession of the carrier, the risk of loss passes to the buyer when the goods are there duly so tendered as to enable the buyer to take delivery.” While not controlling for sales tax purposes, this provision demonstrates what happened to these shipments--Visionstream’s understanding with its clients was that it would arrange shipping of the exhibits to out of state venues, set them up, and prepare them for inspection by the buyer. Title would not pass until the customer inspected and accepted the exhibits.

The Commission relied on *House of Lloyd, Inc. v. Director of Revenue*, 824

S.W.2d 914 (Mo. Banc 1992) to support its position that “under a contract F.O.B. the point of shipment, the title passes at the moment of delivery to the carrier.” (*House of Lloyd* at 923). A review of *Tuttle v. Bracey-Howard Constr. Co.*, 136 Mo.App. 309, 117 S.W. 86 (1909), the case authority cited in *House of Lloyd*, shows that the precedent is inapplicable to the case at hand. In that case, “there was much correspondence as to the routing of the material” at issue (at 87), so that the amount of wire to be delivered, the price and terms of payment, were all specifically provided for and understood by all parties.” (at 87-88). “There was no reservation of title in the interpleader until the wire was paid for.” (Id.) In *Tuttle*, all of the contract terms, including passage of title, were understood by the parties. Unlike this case, there was no requirement that the wire be set up or installed at the destination. It was a finished product that could be delivered to a carrier.

All of the Commission’s findings flow from its unsubstantiated conclusion that “a contract FOB” existed. The Commission lacked substantial evidence in the record to support this finding. The Commission’s conclusion that the buyer bearing the cost of delivery is “consistent with the definition of the term F.O.B.” is meaningless because the expense of delivery is not the key. The key is when Visionstream completed performance of the contract, which could not be done until the property was shipped out of state, per Gary Shasteen of Visionstream:

Q—When it was shipped out of state and you say the client would see it at the site, would there be an inspection process whereby they would review it?

A—Oh, yes, sir, they would always typically come over the day before the show to

look at it.

Q—Was there then—and where was the actual exhibit then eventually accepted?

A—Well, it was accepted there at the site because the people that were spending the money didn't really see it until it appeared at the show site. (emphasis supplied, Tr. 20)

This testimony proves that Visionstream is entitled to the exemption—unlike the wire in the *Tuttle* case or the concrete in the cases discussed below, the displays were not goods that were “ready to go,” such that title passed in Missouri.

The risk of loss can be separate from the passage of title. Here, Visionstream could not complete performance until the goods were delivered at the destination and set up. Here, setup by Visionstream, inspection and acceptance by the buyer were required for title to pass.

The Commission erred in comparing Visionstream's custom-built displays with the concrete in *Kurtz Concrete, Inc. v. Spradling*, 560 S.W.2d 858 (Mo. banc. 1978) and *Southern Red-E-Mix Co. v. Director of Revenue*, 894 S.W.2d 164 (Mo. banc 1995). In those cases, the concrete was ready to use by the customer. That is the point; the custom exhibits are not until they are set up and inspected. The concrete is like the wire in the *Tuttle* case, in which risk of loss and title passed (as negotiated) upon delivery to the carrier.

The Commission also spent several pages of its opinion attempting to divine the parties' intent. The parties' intent in this case is clear from their actions—the unconstructed displays were shipped out of state and subject to acceptance and approval

by the clients. Title passed out of state, per the Director's regulation.

**Conclusion**

The Court should reverse the Administrative Hearing Commission's decision and grant Plaintiff Visionstream's refund claims.

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**Certificate of Compliance**

I hereby certify that I prepared this brief using Microsoft Word 2010 in Times New Roman size 13 font. I further certify that this brief complies with the word limitations of Rule 84.06(b), and that it contains 2005 words.

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**Certificate of Service**

I hereby certify that, on December 8, 2014, I filed a true and accurate Adobe PDF copy of this Brief of the Appellant via the Court's electronic filing system, which notified the following of that filing:

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